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No. 602 48

IN THE

Supreme Court of the United States

October Term, 1956

ROSE STAUB, *Appellant*

v.

CITY OF BAXLEY, *Appellee*

On Appeal From the Court of Appeals of the State of Georgia

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1956

No.

ROSE STAUB, *Appellant*

v.

CITY OF BAXLEY, *Appellee*

On Appeal From the Court of Appeals of the State of Georgia

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Court of Appeals of the State of Georgia, entered on April 12, 1956, affirming the judgment of the Superior Court, Appling County, Georgia, entered on December 10, 1955, which had affirmed the judgment of conviction of appellant, entered in the Mayor's Court of the City of Baxley, Appling County, Georgia, on March 15, 1954, for violation of a municipal ordinance of that city.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported at 94 Ga. App. 18, 93 S.E. 2d 375 (*infra*, pp. 33-41). No opinions were written by the Superior Court or by the Mayor's Court. An earlier opinion of the Georgia Court of Appeals pertaining to an earlier phase of this proceeding is reported at 91 Ga. App. 650, 86 S.E. 2d 712, and an opinion of the Supreme Court of the State of Georgia in a related proceeding is reported at 211 Ga. 1, 83 S.E. 2d 606.

JURISDICTION

Appellant was charged with and convicted of violating an ordinance of the City of Baxley entitled "An Ordinance To Regulate The Solicitation Of Membership In Organizations Among The Citizens Of City Of Baxley: To Provide For Permits For Persons Or Agents Soliciting Such Members; To Provide For License Fees And For Violation Of This Ordinance" (Tr. 13, 19, 27, 46). The judgment of conviction was entered in the Mayor's Court on March 15, 1954 (Tr. 46). A petition for certiorari was overruled by the Superior Court, and its judgment, affirming the judgment of conviction, was entered on December 10, 1955 (Tr. 62). The final judgment of the Georgia Court of Appeals, affirming the judgment of the Superior Court, was entered on April 12, 1956 (Tr. 76); a motion for rehearing was denied by that court on May 15, 1956 (Tr. 96); and an application for certiorari was denied by the Georgia Supreme Court on July 11, 1956 (Tr. 99). Notice of appeal was filed in the Georgia Court of Appeals on October 5, 1956 (Tr. 106). The jurisdiction of this Court to review by appeal the judg-

ment of the Court of Appeals is conferred by 28 U.S.C. § 1257 (2).[1]

THE STATUTE INVOLVED

The ordinance of the City of Baxley, here in issue, adopted on September 17, 1949, and appearing in minute book 3, page 396, of that city, provides as follows:

> Section I. Before any person or persons, firms or organizations shall solicit membership for any organization, union or society of any sort which requires from its members the payment of membership fees, dues or is entitled to make assessment against its members, such person or persons shall make application in writing to Mayor and Council of the City of Baxley for the issuance of a permit to solicit members in such organization from among the citizens of Baxley.
>
> Section II. Such application shall give the name and nature of the organization for which applicant desires to solicit members, whether such organization is incorporated or unincorporated, the location of its principal office and place of business and the names of its officers, along with date of its organization, and its assets and liabilities. Such application shall further contain the age and residence of applicant including places of residence of applicant for past ten years; and as well as business or profession in which such

[1] A municipal ordinance constitutes "a statute of any state" within the meaning of 28 U.S.C. § 1257 (2). *Jamison* v. *Texas*, 318 U.S. 413, 414. State failure or refusal to decide the validity of a state statute, without adequate state ground, is the equivalent of a decision "in favor of its validity" for the purpose of 28 U.S.C. § 1257 (2). *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283. In any event, if appeal is not proper, "the papers wherein the appeal was taken shall be regarded and acted on as a petition for a writ of certiorari. . . ." 28 U.S.C. § 2103. Other aspects of the jurisdiction of this Court are discussed *infra*, pp. 23-31.

applicant has been engaged during said time, and shall furnish at least three persons as references to applicant's character. Said application shall also furnish the information as to whether applicant is a salaried employee of the organization for which he is soliciting members, and what compensation, if any, he receives for obtaining members.

Section III. This application shall be submitted to a regular meeting of Mayor and Council of City of Baxley, and in event it is desired by Mayor and Council to investigate further the information given in the application, or in the event the applicant desires a formal hearing on such application, such hearing shall be set for a time not later than the next regular meeting of the Mayor and Council of City of Baxley. At such hearing the applicant may submit for consideration any evidence that he may desire bearing on the application, and any interested person shall have the right of appearing and giving evidence to the contrary.

Section IV. In passing upon such application the Mayor and Council shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley.

Section V. The granting or refusing to grant such application for a permit shall be determined by vote of Mayor and Council, after consideration and hearing if same is requested by applicant or Mayor and Council, in the same manner as other matters are so granted or denied by the vote of the Mayor and Council.

Section VI. In the event that person making application is salaried employee or officer of the organization for which he desires to seek members among the citizens of Baxley, or persons employed

in the City of Baxley, or receives a fee of any sort from the obtaining of such members, he shall be issued a permit and license for soliciting such members upon the payment of $2,000.00 per year. Also $500.00 for each member obtained.

Section VII. Any person, persons, firm, or corporation soliciting members for any organization from among the citizens of persons employed in the City of Baxley without first obtaining a permit and license therefor shall be punished as provided by Section 85 of Criminal Code of City of Baxley.

Section VIII. All ordinances of City of Baxley in conflict with ordinance are hereby repealed.

Section IX. Should any section or portion of this ordinance be held void, it shall not affect the remaining sections and portions of same.

QUESTIONS PRESENTED

1. Whether freedom of speech, press, and peaceable assembly, guaranteed against state infringement by the Fourteenth Amendment of the United States Constitution as it incorporates the First Amendment, are abridged by an ordinance which provides that: (1) before a person, firm, or organization may solicit citizens of the municipality for membership in any organization requiring payment of membership dues or fees, such person, firm, or organization must first secure a permit from the Mayor and the City Council who may withhold or grant that permit in their discretion based on their consideration of "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens" of the municipality; and that, (2) if the person desiring to solicit is a salaried employee or

officer of the organization for which membership is sought, or receives a fee for obtaining members, such person shall, in addition to securing a permit, pay a license fee of $2,000 per year plus $500 for each member obtained.

2. Whether the right of employees to organize and to select representatives of their own choosing for the purpose of collective bargaining and other mutual aid or protection, safeguarded by the Fourteenth Amendment of the United States Constitution against state deprivation without due process of law, is abridged by the aforesaid ordinance in that (1) it prohibits solicitation of membership for an organization without a permit and that permit may be withheld by the Mayor and the City Council from any person, firm or organization thought by them in their uncontrolled discretion and without any standards to be unsuitable, and (2) it imposes a prohibitive tax on solicitation by a salaried employee or officer of the organization for which membership is sought or by a person receiving any fee for obtaining members.

3. Whether the aforesaid ordinance denies the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution in that (1) it singles out for taxation those persons who are salaried employees or officers of the soliciting organization or who receive any fee for solicitation, leaving all others who have received a permit free to solicit without paying the tax, and (2) it imposes a tax on solicitation grossly in excess of taxes imposed on purely commercial activity.

4. Whether the aforesaid ordinance, in prohibiting in the manner described the solicitation of members

without a permit and in taxing the solicitation of members, conflicts with Section 7 of the National Labor Relations Act which provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

5. Whether consideration by the Supreme Court of the United States of a challenge to the validity of a municipal ordinance on federal grounds, where the challenge is to the ordinance on its face, in its entirety, and the bases of its invalidity are fully particularized, may be precluded by the refusal of the state court to entertain the merits of the challenge for the asserted reason that it is procedurally defective in that (1) the "attack should have been made against specific sections of the ordinance and not against the ordinance as a whole", and (2) "no effort" was made "to comply with any section of the ordinance."

STATEMENT

I. When and How the Federal Questions Were Raised

The federal questions presented by this appeal were first raised by appellant in the Mayor's Court of the City of Baxley by a plea in abatement prior to trial (Tr. 12, 23-26, 51). Exception was taken in that court to its overruling of the plea (Tr. 13, 51). The federal questions were thereafter urged at each succeeding stage throughout the proceedings in the Georgia courts: by certiorari in the Superior Court (Tr. 15-18); by a bill of exceptions in the Court of Appeals (Tr. 4-5); by a motion for rehearing in that court

(Tr. 77-93); and by a petition for a writ of certiorari in the Supreme Court (Tr. 107-122).

II. The Facts

The evidence relevant to appellant's conviction for violation of the ordinance of the City of Baxley adduced at the trial in the Mayor's Court shows as follows:

The International Ladies' Garment Workers' Union is a labor organization that requires dues of its members (Tr. 31).[2] On February 19, 1954, appellant Rose Staub and her companion Mamie Merritt were at a local restaurant in Baxley where they were sought out by the Chief of Police of the City of Baxley (Tr. 30). Questioned by him, Rose Staub told the Chief of Police that she was employed by the Union (Tr. 30), and she and Mamie Merritt both told him that they were in Baxley "going around talking to some of the women to organize the factory workers, * * * to gain membership and gather members for it and hold meetings with them for that purpose." He "did not understand that they were collecting money for members at that time from my conversation with them" (Tr. 31). No permit had been issued to Rose Staub or Mamie Merritt, nor had they made application for a permit, as required by the ordinance (Tr. 41).

On the same day of the conversation with the Chief of Police, a meeting was held at the home of Mrs. Catherine Taylor, attended by her, Rose Staub, Mamie

[2] The Union, headquartered in New York City, has a membership of about 440,000 persons, and has about 450 local unions located throughout the United States. Directory of National and International Labor Unions in the United States, 1955, Bull. No. 1185, U. S. Dept. of Lab., Bur. Lab. Stat., p. 31.

Merritt, and three others (Tr. 32, 35, 38). Excepting Staub and Merritt, the other four at the meeting "all work in Hazlehurst" but "live in Baxley" (Tr. 32).[3] According to Mrs. Taylor, Staub and Merritt had asked "that we hold a meeting at my house. They stated that the purpose of the meeting was for getting members for the union. They asked me to get others together" (Tr. 35). One of the four present stated that she "was interested in knowing what the union would mean to the workers" (Tr. 39). At the meeting, Staub and Merritt "just told us they wanted us to join the union, and said it would be a good thing for us to do—to join the union, and went on to tell us how this union would help us" (Tr. 37). They also explained that the membership dues "would be sixty-four cents a week" (Tr. 32, 36, 38), but that dues were not payable until the plant was organized (Tr. 43); no money was asked of the persons at the meeting (Tr. 33). The cooperation of the four was invited "to get other girls from up there to join the union," and blank membership cards were offered for that purpose (Tr. 34, 32, 33, 37, 38). Rose Staub explained that the objective sought was to "have enough cards signed to petition for an election * * * with the Labor

[3] The reference to Hazlehurst, although the record is somewhat ambiguous in this respect, is to the plant of the Hazlehurst Manufacturing Company, which Staub and Merritt were seeking to organize, located in Hazlehurst, Georgia, a town neighboring Baxley. The Wage and Hour Administrator has issued learner certificates covering this plant pursuant to Section 14 of the Fair Labor Standards Act. 21 Fed. Reg. 1943, 1944 (1956); 19 Fed. Reg. 7460 (1954); 18 Fed. Reg. 7480 (1953). Since the employees at this plant are thus "engaged in commerce or in the production of goods for commerce" within the coverage of the Fair Labor Standards Act, it is apparent that the plant's operations "affect commerce" within the more inclusive coverage conferred by that term under the National Labor Relations Act. *Kirschbaum* v. *Walling*, 316 U.S. 517, 520-521.

Board" (Tr. 44).[4] As none of the four were interested in joining the Union, no membership cards were left with them (Tr. 33, 34, 36-37).

On the same day that this meeting was held, a summons was issued by the Chief of Police commanding appellant Rose Staub to "appear before the Police Court of said City [of Baxley] at 7 o'clock P.M. on the 22 day of February, 1954, to answer to the offense of Soliciting Members for an Organization Without a Permit & License" (Tr. 19). After trial, the Mayor's Court (or the Police Court as it is also called (Tr. 52)), convicted appellant of violation of the ordinance (Tr. 13, 51). She was sentenced to thirty days imprisonment in the City Jail or a fine of three hundred dollars (*ibid.*).

III. The Disposition Below of the Federal Questions

When appellant was summoned "to answer to the offense of Soliciting Members for an Organization Without a Permit & License," she instituted a declaratory judgment action in the Superior Court, Appling County, Georgia, requesting annulment of the ordinance on federal and other grounds and praying for a temporary restraint of enforcement of the ordinance pending declaration, and a permanent injunction against its enforcement upon a declaration of invalidity. Dismissal of the action by the Superior Court was affirmed by the Georgia Supreme Court, that court holding that: " 'If the ordinance is invalid, by reason of its unconstitutionalty, or for other cause, such invalidity would be a complete defense to any prosecution

[4] The reference is obviously to the National Labor Relations Board since Georgia has no comparable state agency.

that might be instituted for its violation.'" *Staub* v. *Mayor of Baxley*, 211 Ga. 1, 83 S.E. 2d 606, 608.

Meanwhile, the temporary restraint against prosecution having been denied, the cause proceeded to trial before the Mayor's Court. In that court, as stated (*supra*, p. 7), the federal questions presented by this appeal were first raised by a plea in abatement prior to trial, and exception was taken in that court to its overruling of the plea. The federal questions were renewed on appeal to the Superior Court from the judgment of conviction (*supra*, p. 7). That court dismissed the appeal without considering the merits (Tr. 2-3, 63), holding in accordance with the City's contention that the appeal was improperly perfected in that the certiorari bond had been approved by and filed with the wrong City official (Tr. 51-52). It so held despite the clear showing that this had been brought about by knowing misrepresentations of the City's officials (Tr. 54-58). On appeal from that determination, the Georgia Court of Appeals held that the bond had been "properly approved and certified" and directed that the case "be returned to the superior court for decision on its merits." *Staub* v. *Baxley*, 91 Ga. App. 650, 86 S.E. 2d 712, 715. On the remand, issue having been joined by the City's denial "that the ordinance is invalid or void for any of the reasons stated" by appellant (Tr. 52), the Superior Court affirmed the judgment of conviction (Tr. 62).

On the second appeal to the Georgia Court of Appeals, that court declined to consider the merits in any respect, holding that "it is not necessary to pass upon the sufficiency of the evidence, the constitutionality of the ordinance, or any other phase of the case . . ." (*infra*, pp. 40-41). It grounded this determination on

its view that: (1) appellant "in each instance attacks the ordinance as a whole. The attack should have been made against specific sections of the ordinance and not against the ordinance as a whole" (*infra*, p. 40); and (2) appellant "made no effort to secure a license" (*infra*, p. 40). No contention of this character had been advanced by the City either in the Mayor's Court or in the Superior Court; no suggestion of it appears in the otherwise full answer filed by the City in the Superior Court (Tr. 51-52). A motion for rehearing was denied by the Court of Appeals and an application for certiorari was denied by the Georgia Supreme Court (*supra*, p. 2).

THE QUESTIONS ARE SUBSTANTIAL

1. Solicitation of membership in a labor organizaton embraces each of the cognate freedoms of speech, press, and peaceable assembly. It is carried on by such means as "personal contacts on streets or at home, telephones, letters or advertised meetings. . . ." *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U.S. 105, 111. In this case a home meeting was held and a discussion of the desirability of joining the Union took place. "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas* v. *Collins*, 323 U.S. 516, 532. And as often happens, literature may also be distributed to persuade employees to join unions, thereby bringing freedom of press into play.

The ordinance in this case conditions the exercise of these freedoms upon securing a permit from the Mayor and Council of the City of Baxley who may grant or withhold the permit in their discretion based on their

consideration of "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley" (*supra*, p. 4). This constitutes previous restraint in its most vicious and primitive form. *Lovell* v. *Griffin*, 303 U.S. 444, 450-452; *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinion in *s. c.*, 316 U.S. 584, 600-602. The discretion conferred on the Mayor and City Council in Baxley is as offensive to the First Amendment as was the discretion of the Director of Safety in Jersey City to refuse a permit for use of the streets or parks to hold a public meeting if in his opinion such refusal would prevent "riots, disturbances or disorderly assemblage" (*Hague* v. *Committee For Industrial Organization*, 307 U.S. 496, 514-516); or the discretion of the Chief of Police in Irvington to refuse a permit to a canvasser based on his determination that "the canvasser is not of good character or is canvassing for a project not free from fraud" (*Schneider* v. *Irvington*, 308 U.S. 147, 157-159, 163-165); or the discretion of the Secretary of the Public Welfare Council in Connecticut to withhold a certificate required for the solicitation of money if he is not persuaded that the "cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity" (*Cantwell* v. *Connecticut*, 310 U.S. 296); or the discretion of the Mayor in Paris, Texas, to refuse a permit to "solicit orders for books," to "sell books," or "to canvass," if "after investigation" he deems such refusal "proper and advisable" (*Largent* v. *Texas*, 318 U.S. 418). In this case, as in those, "Dissemination of ideas depends upon the approval of the distributor by the official.

This is administrative censorship in an extreme form." *Id.* at 422.[5]

The ordinance in this case applies to *all* persons. But it would be no less offensive if its application were confined to "the individual who . . . in exercising these rights [of speech, press and assembly] receives compensation for doing so." *Thomas* v. *Collins*, 323 U.S. 516, 531. Nor does it make a difference that the object is to induce employees to join the Union. The protection of the First Amendment embraces "the opportunity to persuade to action, not merely to describe facts." *Id.* at 537. And the activity is not deprived of its character as speech, press and assembly by calling it "solicitation." *Id.* at 536-537, and concurrence at 546-547.

The ordinance does not stop with censorship. It further provides that, if the person who would solicit members is a "salaried employee or officer of the organization," or receives "a fee of any sort from the obtaining of such members," he must, in addition to securing a permit, pay an annual tax of $2,000 plus "$500.00 for each member obtained" (*supra*, pp. 4-5). This flat tax—plainly more than a nominal fee to defray the expense of a valid regulatory scheme—is fixed in amount, unrelated to the scope of the activity, without basis either in present or potential revenue, and unapportioned in any way. "It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 114. "In its potency as a prior restraint on publi-

[5] See also, *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290.

cation the flat license tax falls short only of outright censorship or suppression." *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinion in *s. c.*, 316 U.S. 584, 611. And the flat tax is no less offensive because it is levied on the solicitor who is a salaried employee or officer of the organization, or receives a fee for his work; a person is not stripped of his protection from the imposition of a flat license tax on his exercise of First Amendment rights because he "earns his livelihood" from that exercise. *Follett* v. *McCormick*, 321 U.S. 573, 576-578. See also, *Grosjean* v. *American Press Co.*, 297 U.S. 233.

Its character as a flat license tax alone vitiates the levy imposed by the ordinance. As we show hereafter, however, the tax is also prohibitive (*infra*, pp. 16-18) and discriminatory (*infra*, pp. 18-20), and for these additional reasons cannot survive the First Amendment's guaranty against abridgment of the freedoms of speech, press, and peaceable assembly.

2. The right of employees to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and otherwise to engage in concerted activity for mutual aid or protection, is a "fundamental right" which exists independently of statutory conferment. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 263-264; *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 259. It is safeguarded by the Fourteenth Amendment against state deprivation without due process of law. The ordinance in this case offends the Fourteenth Amendment in at least two respects:

(a) The ordinance restricts the right to engage in organizational activity to those persons, firms or organizations whom the Mayor and the City Council in their uncontrolled discretion and without any standards deem suitable. The constitutional vice of this restriction has been lucidly stated by the California Supreme Court in *In Re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 719:

> . . . on the face of the ordinance the indefinite standards which it enunciates provide a mechanism for the deprival of constitutional rights, not only on the basis of the guarantees applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity . . . the council members in the exercise of their power might very conceivably conclude that because of an applicant's labor union affiliations or because of his attitude upon controversial labor issues he did not have the prescribed qualities. It is entirely possible that on occasion a majority of the council might be members of a rival labor union or they might be employers engaged in a controversy with the union represented by the applicant. Certainly the standard provided by section 6 of the Redding ordinance is entirely subjective. Each council member is left to determine in his own mind what is "likely" to be the future conduct of the applicant. The character or extent of showing necessary to satisfy the council that the applicant is of good moral character and will not resort to the activities mentioned is not set forth. Satisfaction may be circumscribed by individual whim, caprice, or personal prejudice.

(b) The tax imposed by the ordinance has the effect of prohibiting solicitation of members by all persons who are paid for the work, whether employed at it full

or part-time, and by all officers of the organization, whether paid or not. Directed thus at those who are the effective exponents of the organization, the ordinance requires of them a $2,000 annual tax plus an additional $500 for each member obtained.

The $2,000 annual tax, even if its payment were not required of more than one individual, would alone suppress his engagement in solicitation. But it cannot be so confined. An effective organizational campaign ordinarily requires more than one paid organizer or officer. In this case there were two (*supra*, p. 8). Thus the annual tax must be multiplied by the number of such persons who participate in the campaign in the particular community. It does not stop even there. "It is common knowledge that many of the larger industrial plants . . . are so situated that they draw workers from as many as five or six or more cities." *In re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 722. Organizers and officers may thus be required to move from city to city in any one campaign, and are certainly required to be itinerant where they are engaged in more than one campaign, as they frequently are. Each city may enact a similar tax (*infra*, pp. 22-23), and the cumulative effect is obviously prohibitive. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115; *In re Porterfield, supra*, 168 P. 2d at 722. The record in this case shows that the working force is drawn from at least two cities, Baxley and Hazlehurst (*supra*, p. 9). Hazlehurst has an ordinance virtually identical to Baxley's except that the annual tax is $5,000.[6] Appellant would therefore be required to pay an annual tax of at least $7,000, if the ordinances be valid.

[6] Ordinance of August 5, 1952, City of Hazlehurst, County of Jeff Davis, State of Georgia, Minute Book No. 4, Page 2.

Finally, the additional tax of $500 for each membe obtained without more prohibits solicitation. In thi case the weekly due required of a member are 6 cents, payable only it the plant is organized (*supra*, p 9). At this rate, a person would have to be a dues paying member for 15 years before the initial $50 outlay were recovered, without counting the inter vening cost of providing service for that member.

Solicitation of members is to a union "what breath ing is to a human being." *In re Porterfield*, *supra* 168 P. 2d at 722. To prohibit it, as this tax effectivel does, is to kill unionization. "The power to tax is no the power to destroy while this court sits." Mr. Justic Holmes in *Panhandle Oil Co.* v. *Mississippi*, 277 U.S 218, 223.

3. While a "state has a broad discretion in classi fication," the "constitutional guaranty of equal protec tion of the laws is interposed against discrimination that are entirely arbitrary." *Smith* v. *Cahoon*, 28 U.S. 553, 566-567.[7] The tax imposed by the ordinance in this case is discriminatory in this sense in at leas two respects:

(a) The annual tax of $2,000 plus $500 for each member obtained is grossly in excess of taxes whic the City of Baxley imposes on business enterprises en gaged in purely commercial activity for profit. Th Clerk of the City Council of Baxley testified as fol lows concerning "a schedule of licenses that ar charged by the City of Baxley for various business" (Tr. 41-42):

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[7] See also, *Skinner* v. *Oklahoma*, 316 U.S. 535; *Hale* v. *Bimc Trading, Inc.*, 306 U.S. 375.

> The amount of yearly license required for automobile accessories, wholesale and retail, is $100. $150 is the amount charged a bank or banker. For a billiard or pool room, the first table is $100, and $10 each additional table. The book or magazine agent is charged $10 per day. $2 per day is charged for a bill poster and bill cards, and sample advertising matter. $50 is charged for a cafe or restaurant. A carnival tent show is charged $100 per day with the consent of the Mayor and Council. The amount charged to merchants with general and specific stock is broken down into terms of merchandise and it is based on inventory. $150 is charged from $10,000 to $20,000. $100 is charged from $5,000 to $10,000. The regular moving picture show is charged $200 per year.

The vice of the discriminatory levy imposed by the ordinance is emphasized by the force of the observation that, as stated by the National Labor Relations Board, labor organizations, "when engaged in their primary function of advancing employee welfare, are institutions unto themselves within the framework of this country's economic scheme," and are not classifiable as "business organizations." *Oregon Teamsters' Security Plan Office*, 113 NLRB 987, 991, affirmed 38 LRRM 2269/ (C.A.D.C. June 21, 1956), certiorari granted, November 13, 1956.

(b) The ordinance requires a permit of *all* who would solicit members. But it imposes the tax only on those who are paid organizers or who are officers of the organization. There is nothing either in their compensation or in their status that provides a rational basis for this differentiation. The tax imposed bears no conceivable relationship to the compensation received. And giving the widest possible latitude to

status, it is wholly unrelated to the exaction based upon it.

4. Section 7 of the National Labor Relations Act provides that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." The ordinance in this case conflicts with the National Act in numerous respects:

(a) In *National Labor Relations Board* v. *Babcock and Wilcox Company*, 351 U.S. 105, this Court held that an employer may, if he does not discriminate, close his property to non-employee organizers, but only "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message" (*id.* at 112), "such as [by] the mail, telephones, as well as [at] the homes of the workers . . ." (*id.* at 107). The ordinance, however, closes every means of communication to every one save only as the Mayor and the City Council choose to open them to those they approve. It clogs the very interchange which the National Act contemplates shall be free.

(b) The soliciting of membership in a labor organization is the preliminary but indispensable step to the designation of the union as the bargaining representative by a majority of employees in the appropriate unit. The ordinance undercuts the "full freedom"[8] of employees to make their selection by confining the appeals to which they may listen to those made by

[8] Title I, sec. 1, para. 5, Labor Management Relations Act, 1947.

"persons, firms or organizations", if any, whom the Mayor and the City Council approve. But "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications." *Hill* v. *Florida*, 325 U.S. 538, 541. See also, *United Mine Workers* v. *Arkansas Oak Flooring Company*, 351 U.S. 62.

(c) "Congress did not intend to subject the 'full freedom' of employees to the eroding process of 'varied and perhaps conflicting provisions of state enactments.'" *Hill* v. *Florida*, 325 U.S. 538, 542; see also, *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 123-124. If the ordinances of the type in this case are permitted to stand, the erosion from 48 *state* enactments will seem as nothing compared to the crazy quilt which would be produced by the multiplicity of ordinances spawned by town after town within a state. Workers employed in a single plant, but living in different neighboring towns, would have their choice circumscribed by as many of the different views as the different city fathers entertained; as in this case (*supra*, p. 17), Baxley might bar an organization which Hazlehurst found acceptable.

(d) The tax imposed by the ordinance is levied for engaging in the solicitation of membership. The activity subjected to the tax is conduct protected by the National Labor Relations Act. A state may not burden by a fixed-sum license tax activity safeguarded by Congress pursuant to its exercise of its power to regulate interstate commerce. Cf. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45, n. 2, 55-57. In addition, the same reasons which make this tax offensive to the First and Fourteenth Amendments

(*supra*, pp. 14-15, 16-19) show that it is incompatible with the National Labor Relations Act. Finally, "Congress occupied this field and closed it to state regulation." *International Union* v. *O'Brien*, 339 U.S. 454, 457. See also, *Denton* v. *City of Carrollton*, 235 F. 2d 481 (C.A. 5).

5. The questions presented have widespread public importance. A random search has uncovered numerous ordinances of the type in this case. Indications are that systematic inquiry would disclose many more. Three have been found which are identical to the instant ordinance except for variations in the tax in two[9] and no tax in the third.[10] Six have been found which differ in style but not in purport from the instant ordinance; in each the issuance of the license is discretionary and a tax is imposed.[11] Other ordinances im-

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[9] Madison, Florida, Ordinance No. 40, Jan. 24, 1956 ("$300.00 per year, and $25.00 for each member"; invalidated in *Pittman* v. *City of Madison*, 38 LRRM 2567 (Fla. Cir. Ct., July 14, 1956)); Hazlehurst, Jeff Davis County, Georgia, Aug. 5, 1952, Minute Book 4, Page 2 ("$5000.00 per year").

[10] Halifax County, Virginia, Aug. 6, 1956, Minute Book 8, Page 38.

[11] Carrollton, Georgia, Nov. 12, 1954, Minute Book 8, Page 477 ($1,000 tax plus $100 for each day of activity; in *Denton* v. *City of Carrollton*, 235 F. 2d 481 (C.A. 5), the Court of Appeals for the Fifth Circuit remanded the case to the District Court to hear the merits of a complaint challenging the validity of this ordinance); Milledgeville, Georgia ($5,000 annual tax; invalidated in *Starnes* v. *City of Milledgeville*, 15 LRRM 526 (Ga. Super Ct., Aug. 29, 1944)); Dublin, Georgia, April 19, 1956 ($2,500 annual tax; this ordinance also requires an oath forswearing, *inter alia*, communism and belief "in the overthrowing of the municipal or state laws in regard to segregation"); Camilla, Georgia, May 19, 1947, City Code, Section 424, as amended ($1,500 annual tax); Senatobia, Tate County, Mississippi, April 5, 1956 ($1,000 annual tax); Eupora, Webster County, Mississippi, Sept. 4, 1956, Minute Book 9, Pages 167-168 ($1,000 annual tax).

pose a tax, some coupled with a registration requirement which may or may not have discretionary elements.[12]

6. The Georgia Court of Appeals declined to consider the merits of the federal grounds urged to invalidate the ordinance for the asserted reasons that (1) the "attack should have been made against specific sections of the ordinance and not against the ordinance as a whole," and (2) "no effort" was made "to comply with any section of the ordinance" (*infra*, p. 40). Whether the refusal to decide a federal question is supported by an adequate state ground "is itself a Federal question." *Lovell* v. *Griffin*, 303 U.S. 444, 450.[13] For "constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it. . . ." *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282.

(a) Georgia's insistence upon an attempt at compliance with the ordinance as the price of challenging its validity on its face resurrects that State's contention interred by this Court in *Lovell* v. *Griffin*, 303 U.S. 444, 452-453: "As the ordinance is void on its face, it was

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[12] Bainbridge, Georgia, April 21, 1953 ($500 annual tax on "Labor Agents" plus registration required for a permit); Marianna, Florida, May 9, 1955 ($750 tax on a "Labor Organizer"); Madison, Georgia, July 30, 1946 ("$100.00 for the privilege of soliciting membership in, or organizating such [Labor] Unions"); Dothan, Alabama, Ordinance No. 1862, Oct. 11, 1955 ("Labor Union Organizers, $50.00"); Russellville, Kentucky, May 8, 1956 ($250 tax on "labor organizer and promoter" and $100 tax on "labor solicitor;" tax required to obtain a license good for the period from issuance to succeeding April 30th; license will issue "if the application gives correctly the information required;" license revocable if the application contains "false information" or the licensee is convicted of a felony).

[13] See also, *Angel* v. *Ballington*, 330 U.S. 183, 189.

not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." Only after a determination that an ordinance has a valid scope for operation on its face can an attempt to comply with it be exacted as the condition of attacking anticipated invalidity in its application. *Smith* v. *Cahoon*, 283 U.S. 553, 562. But where, as here, "the ordinance is void on its face," the "Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinion in *s. c.*, 316 U.S. 584, 602-603. See also, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386; *Thornhill* v. *Alabama*, 310 U.S. 88, 97.

(b) Equally without merit is the State's refusal to adjudicate the validity of the ordinance because challenged "as a whole."

(*i*) It is clear that a state statute or ordinance may be void in whole on federal grounds. It is therefore indispensable to the preservation of the federal right to permit an "attack [which] is directed, not against any specific provision or provisions, but against the ordinance as an entirety." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386. Any other view requires the conclusion that to secure relief from an invalid restraint at all, a person must suffer its continuance in part. The permissible scope of an attack must at least be commensurate with the source of the wrong. If that source is an ordinance void in its entirety, the injured person must be free to level his challenge at the whole of it. Appellant was charged with and convicted of violating the ordinance as a whole; she is

entitled to a defense as broad as the charge and the conviction. *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinion in *s. c.*, 316 U.S. 584, 603.

It is true that, though a state statute or ordinance be challenged in its entirety, a determination of the merits may result in a holding that it is valid in one part and invalid in another with the good separable from the bad and capable of independent enforcement. But that is no more reason for refusing, in advance of determination, to entertain the merits of the challenge than it would be for declining to adjudicate an attack on a part of an ordinance or statute because it may prove not to be invalid at all. ". . . until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left. This was the situation which confronted the appellant when obedience to the statute was demanded and punishment for its violation was sought to be inflicted." *Smith* v. *Cahoon*, 283 U.S. 553, 563-564. The State may not "impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope" of the law. *Id.* at 564. "One who might have had a license for the asking may . . . call into question the *whole scheme of licensing* when he is prosecuted for failure to procure it." *Thornhill* v. *Alabama*, 310 U.S. 88, 97. (Emphasis supplied.) See also, *Jones* v. *Opelika*, 319 U.S. 103, adopting *per curiam* on rehearing the dissenting opinion in *s. c.*, 316 U.S. 584, 603.

What a state *may* require, when a statute or ordinance is challenged in whole or in part, is that the alleged bases of invalidity be adequately particularized and timely raised. But no more may be required. "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67.[14] There is no question in this case, and none has been suggested, but that the bases of invalidity of the instant ordinance were fully particularized. A reading of the plea in abatement (Tr. 23-26), by which the federal questions were raised prior to trial in the Mayor's Court, shows that the grounds of invalidity were detailed with far greater specificity than in *Lovell* v. *Griffin*, 303 U.S. 444, 448-449, where this Court, rejecting Georgia's contrary determination in that case, held that the statement of the federal questions presented "was sufficiently specific" (303 U.S. at 449). And since the federal questions were first presented in the Mayor's Court, and thereafter urged at each succeeding stage throughout the proceeding, there is equally no doubt, and none has been suggested, but that they were raised in due time.

To hold that the decision below rests on an adequate state ground would be, therefore, to sanction obliteration of federal rights. "Whatever springes the state may set for those who are endeavoring to assert rights

[14] See also, *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590, 599.

that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. * * * The principle is general and necessary." *Davis* v. *Wechsler*, 263 U.S. 22, 24. It applies here. *Brown* v. *Western Railway*, 338 U.S. 294, 296, 298-299.

(*ii*) The rule which the court below professes in this case does not accurately reflect Georgia practice. Georgia permits an attack upon the whole of a statute or ordinance as well as on a particular part or parts of it; in either case, the requirement for entertainment of the merits of the challenge is reasonable particularization.

The Georgia rule is stated as follows in *Flynn* v. *State*, 209 Ga. 519, 74 S.E. 2d 461, 464:

> In order to raise a question as to the constitutionality of a "law" at least three things must be shown: (1) *the statute, or particular part or parts of a statute* which the party would challenge must be stated or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must be clearly designated; and (3) it must be shown wherein *the statute, or some designated part of it,* violated such constitutional provision.
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> * * *
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> Until a clear, definite and specific attack is made upon *the constitutionality of the act as a whole, or upon the constitutionality of a specifically pointed out part or parts of it,* this court must and will decline to deal with its validity. . . . (Emphasis supplied.)

Thus, in *Atlanta Loan Co.* v. *Peterson*, 181 Ga. 266, 182 S.E. 15, in entertaining an attack upon a statute as "unconstitutional and void" (182 S.E. at 16), the

Georgia Supreme Court concluded that, as "to the rights conferred by the prior security deed, the entire act is invalid" (*id.* at 15), and it explained its approach as follows (*id.* at 17):

> As indicated in the preceding statement, the defendant challenged the Act of March 28, 1935 [a complex three-section enactment], on several grounds. Since we are of the opinion that *the whole act is invalid* as applied to the prior security deed, for the reason that its enforcement would unconstitutionally impair the obligations of such contract, we do not deem it necessary to consider the other questions raised. While under this record the defendant was directly concerned with section 2 only, *it did not attack this section in particular, but in each ground of objection assailed the statute as a whole.* In this state of the record *it is necessary to examine the attack in its entirety,* because, if any part of it may be constitutionally applied to the contract in question, the attack embracing a mass objective only will necessarily fail, and the judgment against the plea should be affirmed. Theoretically, the defendant's position would have been safer if a separate objection had been made to section 2; and at the same time, in the view which we take of the case, a decision of the single question would have been sufficient under the present record. But *after a consideration of the act as a whole,* we are convinced that *none of it may be constitutionally enforced* as to contracts in existence at the time of its passage, and thus that the loan company should have prevailed in the court below. (Emphasis supplied.)

See also, *Miller* v. *Head,* 186 Ga. 694, 198 S.E. 680, 687; *Franklin* v. *Harper,* 205 Ga. 779, 55 S.E. 2d 221, 223-224, 226-227, 228-229, appeal dismissed, 339 U.S. 946.

Concrete exemplification of this approach is afforded by the decision of the court below in *Campbell v. City of Thomasville*, 6 Ga. App. 212, 64 S.E. 815. The Court had under review convictions for the violation of two ordinances, one of the City of Thomasville, the other of the City of Waycross, both regulating the sale of "near beer." The Thomasville ordinance had four sections (64 S.E. at 817-818); the Waycross ordinance had twelve sections (*id.* at 820-821); and each had numerous intra-sectional regulations. The attack levelled at the Thomasville ordinance was that "the said ordinance as it is written is void in its entirety . . . upon its face" (*id.* at 818-819); the Waycross ordinance was attacked as a whole as "illegal, invalid, and contrary to the law of the state" (*id.* at 819-820), neither attack attempted to segregate the sections of the ordinance but stated the reasons supporting invalidity at large. The Court examined each section of the ordinance to adjudge the validity and constitutionality of each (*id.* at 821-827). The Court concluded that "several provisions of the Waycross ordinance . . . [are] unreasonable and void, and that one requirement of the Thomasville ordinance . . . [is] invalid" (*id.* at 827). At this stage the Court put the following question (*ibid.*):

> What effect does this have upon the convictions? An ordinance may be void in part and good in part. The void and the good may be so interdependent as to render the whole void, or may be so separable as to allow a segregation and the enforcement of one part, while the remainder is nugatory. [Cases cited.] So, also, an ordinance apparently reasonable on its face may be shown to be unreasonable and invalid as actually applied to the existing state of circumstances.

The Court concluded that "the invalid requirement in the Thomasville ordinance is [not] so material a part of the enactment, so interwoven into the whole legislative scheme, that its presence renders the entire ordinance void" (*ibid*). It therefore sustained the conviction for violation of this ordinance for failure to comply with the valid part. But it concluded that the invalid parts of the Waycross ordinance rendered the whole nugatory and it set aside the conviction under it (*id.* at 828).

Accordingly, even if it were otherwise free, as we have shown it is not (*supra*, pp. 24-27), to decline to entertain the merits of the federal questions in this case on the basis of a procedure which itself offends federal rights, it is plain that the refusal of the court below to decide the federal claims here is in any event without warrant in Georgia procedure.[15] This being

[15] For other Georgia cases which have either voided a statute or ordinance in its entirety, or entertained the merits of such an attack, see: *National Linen Service Corp.* v. *Mayor of Milledgeville*, 51 Ga. App. 167, 179 S.E. 837; *Chandler* v. *City of Tifton*, 206 Ga. 43, 55 S.E. 2d 569; *Ellington Co.* v. *City of Macon*, 177 Ga. 541, 170 S.E. 813. *Anthony* v. *City of Atlanta*, 66 Ga. App. 504, 18 S.E. 2d 81, on which the court below relied, is beside the point. The ordinance in that case was a very lengthy regulation of beauty parlors covering such questions as minimum prices, hours during which the shop could remain open, licenses, and the like. Appellant was convicted of violating section 1 of the ordinance in that he charged $1.50 for a permanent wave, the minimum price fixed by the ordinance being $2.50. Appellant apparently did not attack section 1 of the ordinance, the provision under which he was convicted, did not particularize in what respect other sections of the ordinance were invalid, and did not show wherein section 1 would be annulled if his amorphous attack on other sections prevailed. Indeed, he did not even specify whether his attack was grounded on the Federal or state constitution. In these circumstances the Court's conclusion that the constitutional attack was too indefinite is quite understandable. This decision, however, furnishes no fair support for the result reached here, as the other Georgia decisions cited and discussed above plainly show.

so, its determination cannot stand in the way of adjudication of the federal questions, for the "non-Federal grounds of decision" are "without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward* v. *Love County*, 253 U.S. 17, 22. Accordingly, "When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide." *Angel* v. *Bullington*, 330 U.S. 183, 189. The ostensible state ground in this case cannot survive objective examination.[16]

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[16] See also, *Pollock* v. *Williams*, 322 U.S. 4, 13 and n. 21; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 163-164; *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540; *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42; *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283.

The studied avoidance of decision of the federal questions in this case is underscored by the sequence of decisions below. As shown (*supra*, pp. 10-12), the declaratory judgment action was dismissed by the Georgia Supreme Court because the validity of "the ordinance", it was stated, would be open on the prosecution for its violation; the Superior Court initially invoked a spurious ground to hold the appeal had not been properly perfected; thereafter the Court of Appeals invoked no less spurious grounds to decline to reach the merits of the federal questions; and the Georgia Supreme Court denied certiorari.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

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November, 1956